No. 22-

In the Supreme Court of the United States

GENE DEVERAUX, PETITIONER

v.

STATE OF MONTANA

ON PETITION FOR A WRIT OF CERTIORARI TO THE MONTANA SUPREME COURT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a trial court commits structural error, requiring automatic reversal under the Sixth Amendment, when it seats a biased juror after erroneously denying a for-cause challenge to that juror.

RELATED PROCEEDINGS

Montana Supreme Court

State of Montana v. *Gene Deveraux,* Case No. DA 19-0671 (July 5, 2022)

Montana Twenty-Second Judicial District Court, Carbon County

State of Montana v. *Gene Deveraux*, Case No. DC 17-01 (Nov. 19, 2019)

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INTRODUCTION

"Few, if any, interests under the Constitution are more fundamental than the right to a fair trial by 'impartial' jurors." *Gentile* v. *State Bar of Nevada*, 501 U.S. 1030, 1075 (1991). Courts have revered that right since the very beginning of our Republic. Chief Justice Marshall, presiding over jury selection in the trial of Aaron Burr, stated that he "conceive[d] an impartial jury as required by the common law, and as secured by the constitution." *United States* v. *Burr*, 25 F. Cas. 49, 50 (C.C.D. Va. 1807). Marshall recognized that the jury is to be "prize[d]" not for its own sake, but "because it furnishes a tribunal which may be expected to be uninfluenced by any undue bias of the mind." *Ibid.*

The corollary to the fundamental right of an impartial jury is the fundamental *wrong* of seating a biased juror. That is why this Court has oft recognized that the "seating of any juror who should have been dismissed for cause *** require[s] reversal." *United States* v. *Martinez-Salazar*, 528 U.S. 304, 316 (2000); *Ross* v. *Oklahoma* 487 U.S. 81, 85 (1988) (if a biased juror "sat on the jury *** the sentence would have to be overturned"); accord *Morgan* v. *Illinois*, 504 U.S. 719, 729 (1992).

From these two truths, it follows that if a trial court erroneously denies a for-cause challenge and a biased juror is consequently seated, the trial court commits structural error. Yet, this Court's line of Sixth Amendment precedent stops just short of that point. The Court "has never held that juror bias is structural error requiring automatic reversal." *Austin* v. *Davis*, 876 F.3d 757, 803 (5th Cir. 2017) (Owen, J.,

concurring); accord Zachary L. Henderson, *A Comprehensive Consideration of the Structural-Error Doctrine*, 85 Mo. L. Rev. 965, 983-90 (2020). And because this Court never took that last step, lower courts have been left to plot their own paths. Troublingly, they have split in two different directions.

Some state courts have rightly recognized that the erroneous denial of a for-cause challenge constitutes structural error, requiring automatic reversal. See *People* v. *Abu-Nantambu-El*, 454 P.3d 1044, 1046, 1052 (Colo. 2019). Other courts—including Texas and now Montana—have strayed. They hold that the erroneous seating of a biased juror is *not* structural error. See App. 41a; *Love* v. *State*, No. AP-77,085, 2021 WL 1396409, at *9 (Tex. Crim. App. Apr. 14, 2021), cert. denied, 142 S. Ct. 1406 (2022). These courts disregard whether a biased juror sat, denying Sixth Amendment claims on the ground that the defendant could not show the erroneous denial of a for-cause challenge prejudiced him—for instance, by causing the defendant to expend a peremptory challenge. This upends the Sixth Amendment, which guarantees the right to an unbiased jury but does *not* guarantee the right to peremptory challenges. And it deprives defendants of their "choice" of responding to a trial court's error in denying a for-cause challenge by "letting [the biased juror] sit on the petit jury and, upon conviction, pursuing a Sixth Amendment challenge on appeal." *Martinez-Salazar*, 528 U.S. at 315.

The Court's intervention is warranted. The right to an unbiased jury can be a matter of life or death. Sixth Amendment rights (including the right to an impartial jury) are "fundamental to the American scheme of justice." *Ramos* v. *Louisiana*, 140 S. Ct. 1390, 1397 (2020) (quoting *Duncan* v. *Louisiana*, 391

U.S. 145, 148-50 (1968)). "American"—that is to say, *National*. The right to a jury free of biased jurors is a right guaranteed by the Constitution, and whether the deprivation of that right is structural cannot be decided piecemeal on a state-by-state basis. This Court alone can resolve the split.

This case provides an ideal opportunity to resolve whether the erroneous denial of a for-cause challenge amounts to structural error where, as here, it leads a biased juror to be seated. Petitioner Gene Deveraux preserved his Sixth Amendment claim, the courts below analyzed whether the error was structural, and the Montana Supreme Court rejected Deveraux's claim. In these respects, the case presents none of the vehicle issues raised by Texas in *Love* v. *Texas* (No. 21-5050), where this Court narrowly denied review (with three justices dissenting) on a similar question. Indeed, the results below and in *Love* reflect a trend of state-law rules that, while aimed at protecting peremptory strikes, have the effect of abridging the right to an impartial jury.

Certiorari should be granted. See Rule 10(b), (c).

OPINIONS BELOW

The Montana Supreme Court's opinion (App. 1a-24a) is reported at 512 P.3d 1198. The Montana district court's decision denying Deveraux's motion for a new trial (App. 25a-50a) is not reported.

JURISDICTION

The judgment below issued on July 5, 2022. On September 16, 2022, Petitioner applied for an extension of time to file a petition for writ of certiorari. Justice Kagan granted that application, extending the time to file this petition to and including November 2,

2022. Petitioner timely filed this petition. The Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Const., amend. VI:

> In all criminal prosecutions, the accused shall enjoy the right to * * * trial, by an impartial jury * * *.

U.S. Const., amend. XIV:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law.

STATEMENT

A. A Biased Juror Sat On Deveraux's Jury.

In the midst of contentious divorce proceedings, Gene Deveraux was accused by his wife and stepdaughter of rape and sexual abuse. The State of Montana charged Deveraux with six counts of incest, sexual assault, and sexual intercourse without consent.

During voir dire, one of the prospective jurors indicated that she had some personal issues she would prefer discussing privately. App. 4a. The trial court thereafter allowed jurors to volunteer for individual questioning in chambers "if you feel like there's information that you really don't want to say in front of this panel that you feel is important for us to know." App. 54a. One juror—Richard Gorsuch ("R.G.")—indicated he "would be in that circumstance" and would "rather talk *** in a private setting." App. 55a.

The court conducted R.G.'s voir dire in chambers. Defense counsel asked "would it be easier for you just

to tell us or would it be easier for me to ask questions?" R.G. explained that his girlfriend had been the victim of repeated marital rape:

> I'll just tell you. I have a [girl]friend that is – was a spouse, she's divorced now, and the 'no means no' didn't apply in that relationship.
>
> I think that all forms of sexual crimes are horrible, but I believe this person to be true when she speaks of these things and I know that in society lots of times society will say, well, that's his wife or that's her husband and that can't be that way. But it is. It absolutely is.
>
> And this is one of – in my opinion, this is one of the crimes that's hard to prosecute because of that fact. Okay. A lot of society behooves it [*sic*] the woman or the man that's being preyed upon. And I think it's very unfair that a spouse should go through something like that. I mean, beyond unfair. Does that explain?

App. 56a. R.G. noted that the subject was "an emotional thing" for him (App. 57a), a concern confirmed by both the defense and prosecution. Defense counsel remarked that R.G. "seem[s] emotional about this issue" (App. 56a), and the prosecutor agreed: "I think it's pretty obvious to all of us that you think this is an important issue" (App. 58a).

R.G. further explained that his girlfriend stayed in the abusive marriage "for a long time" and that "she just figured [the rape] was her wifely duty." App. 56a. And when asked if he could "overcome" his emotions and "extend to [Deveraux] the presumption of inno-

cence," R.G. candidly concluded: "I may have a problem in this area, out of sympathy" for the alleged victim. App. 57a.

R.G. then confirmed that it would be unfair to Deveraux if R.G. sat on the jury:

> [Deveraux's counsel]: If you were my client, would you want you on the jury?
>
> [R.G.]: I don't believe so.
>
> [Counsel]: Just because of your own sort of internal and with what's happened with your girlfriend.
>
> [R.G.]: I think to be fair to [Deveraux], I should not be chosen.

App. 57a. Deveraux moved to strike R.G. for cause. *Ibid.*

The prosecutor attempted to rehabilitate R.G. He asked leading questions, eliciting R.G.'s agreement that "rape [is] repugnant," that "there's laws against rape," and that R.G. was "in agreement with the law." App. 58a. R.G. initially responded that he could "judge fairly." App. 59a. But on further questioning, his answer was equivocal: "I can be [fair and impartial]. I just - - well, I'm just like everybody else, I suppose. I just don't like it at all." *Ibid.* With R.G. wavering, the prosecutor again emphasized the "importance of your duty as a jur[or]" and asked whether R.G. was "good for [his] word" and would "fulfill [his] oath." *Ibid.* The judge then directly questioned R.G. and denied Deveraux's motion to strike R.G. for cause. App. 59-60a.

Of the five prospective jurors who volunteered to privately discuss their reservations about serving on

the jury, R.G. was the only one challenged for cause but not dismissed (and the only one to sit on Deveraux's jury). App. 5a.

Deveraux exhausted his six peremptory challenges striking other jurors, including a city prosecutor in the same county, the pastor of a key prosecution witness, the schoolmate of a case detective, and a retired law enforcement officer. R.G. sat on the jury, which found Deveraux guilty of all six counts. Appellant's Opening Br. 34 & n.2. The court sentenced Deveraux to 100 years in prison. App. 11a.

B. The Trial Court Rejected Deveraux's Claim That The Sixth Amendment And *Ross* Required A New Trial.

Deveraux moved for a new trial. Among other things, he argued that the trial court committed structural error, in violation of his Sixth Amendment right to a fair trial, by rejecting his for-cause challenge and seating R.G. App. 14a. The trial court analyzed his claim under the test set forth by the Montana Supreme Court in *Montana* v. *Good*, 43 P.3d 948 (2002). Under that test, "structural error occurs if: (1) a district court abuses its discretion by denying a challenge for cause to a prospective juror; (2) the defendant uses one of his or her peremptory challenges to remove the disputed juror; and (3) the defendant exhausts all of his or her peremptory challenges." *Good*, 43 P.3d at 960. The trial court held that the erroneous denial of a for-cause challenge against R.G. could not be structural error because Deveraux had not used a peremptory challenge to remove R.G. App. 43a.

Deveraux argued that under this Court's decision in *Ross* v. *Oklahoma*, 487 U.S. 81 (1988), the "core inquiry" is "whether a biased juror made it onto the jury."

App. 42a-43a. In *Ross*, this Court stated that if a biased juror "sat on the jury *** the sentence would have to be overturned." 487 U.S. at 85. Deveraux argued that because the trial court's denial of his for-cause challenge led a biased juror to be seated, applying the *Good* test "violate[d] United States Supreme Court precedent regarding the Sixth Amendment right to an impartial jury." App. 42a.

The trial court rejected Deveraux's Sixth Amendment claim, reasoning that controlling Montana precedent required him to satisfy the *Good* test in order to establish structural error under the Sixth Amendment. App. 41a-43a. The trial court explained that "unless and until the Montana Supreme Court has determined that [the *Good* test] was decided incorrectly the Court is bound to follow its precedent." App. 43a. Alternatively, the court concluded that Deveraux's jury was impartial. *Ibid.*

C. The Montana Supreme Court Held That Structural Error Only Occurs Under The Sixth Amendment If Deveraux Had Used A Peremptory To Remove R.G.

Deveraux appealed to the Montana Supreme Court, reprising his Sixth Amendment challenge.

The voir dire showed that R.G. was biased, Deveraux explained, and the Montana Supreme Court had repeatedly held it "improper for counsel or the court to attempt to rehabilitate the juror through the use of leading or loaded questions, such as whether the juror will follow the law, jury instructions, or an order of the court." Appellant's Opening Br. 29 (quoting *State* v. *Johnson*, 437 P.3d 147, 151-52 (Mont. 2019)). Deveraux argued that by denying his for-cause challenge and seating a biased juror, the trial

court denied him a fair trial. Invoking *State* v. *Anderson*, 446 P.3d 1134 (Mont. 2019), Deveraux stressed that "[i]mproperly denying a legitimate challenge for cause is an abuse of discretion and a structural error requiring automatic reversal." *Id.* at 33-34. In *Anderson*, an empaneled juror told the bailiff—after the defendant had exhausted his peremptory strikes—that "he [was] pretty sure the Defendant is guilty." 446 P.3d at 1136. The Montana Supreme Court held that the trial court abused its discretion in failing to strike the juror for cause and deemed the error "structural in nature, requiring reversal." *Id.* at 1140. That reasoning applies with equal force here, Deveraux argued, because "a conviction from a biased jury must be reversed." Appellant's Opening Br. 33-34 (citing *Martinez-Salazar*, 528 U.S. at 304)). Nor did it matter that Deveraux did not exercise a peremptory strike on R.G.: the *Good* decision "does not foreclose a new trial," Deveraux explained, "when a biased juror, nevertheless, is seated on the jury." *Id.* at 35.

The Montana Supreme Court affirmed. Unlike the trial court, the supreme court did not even attempt to justify the seating of R.G. but turned directly to Deveraux's Sixth Amendment challenge. App. 13a-14a (citing U.S. Const. amend. VI). The court held that *even if* R.G. was biased, the denial of a for-cause challenge against R.G. was not structural error. The court dismissed *Anderson* as limited to its unique facts—an "unusual scenario" that was "not present here." App. 14a-15a. In other words, the court made crystal clear the baseline rule that the seating of a biased juror, over a well-made objection for cause, may support a valid Sixth Amendment claim, but it does not present structural error.

The Montana Supreme Court rejected Deveraux's argument that the trial court committed structural error by denying his for-cause challenge because it led R.G. to be seated. Instead, the Court applied the *Good* test, requiring the defendant to "use[] one of his or her peremptory challenges to remove the disputed juror" as a condition of finding structural error for "denying a challenge for cause to a prospective juror." App. 14a. Because "Deveraux did not use a peremptory challenge to remove R.G.," the Court reasoned, he "cannot satisfy [this] part *** of the analysis." *Ibid.* In other words, only if the *Good* test were satisfied would the erroneous denial of a for-cause challenge warrant reversal. That would mean that the seating of a biased juror would essentially *never* lead to reversal, since the *Good* test can be satisfied only when the biased juror is stricken with a peremptory.

REASONS FOR GRANTING THE PETITION

I. This Court Has Yet To Hold That If A Criminal Court Denies A For-Cause Challenge And Seats A Biased Juror, It Commits Structural Error Requiring Automatic Reversal.

This Court has repeatedly *suggested* that where, as here, a trial court erroneously denies a defendant's for-cause challenge, and a biased juror is consequently seated, the error "require[s] reversal." *Skilling*, 561 U.S. at 395-96 (quoting *Martinez-Salazar*, 528 U.S. at 316); accord *Ross*, 487 U.S. at 85-86. It has also *implied*, more generally, that violations of a defendant's Sixth Amendment right to an impartial jury are structural errors requiring automatic reversal. See *infra* 13-14. But this Court has yet to *hold* as much. In the space left by this Court's inaction, the lower courts

have taken divergent approaches to Sixth Amendment challenges based on biased jurors who are seated over a criminal defendant's for-cause objection.

1. In *Ross*, this Court considered whether a criminal court violated the defendant's Sixth Amendment or due process rights by erroneously denying a for-cause challenge, leading him to expend a peremptory strike on the juror. 487 U.S. at 84-85. This Court observed that it is "well settled that the Sixth and Fourteenth Amendments guarantee a defendant *** the right to an impartial jury." *Id.* at 85. But in *Ross*, the defendant "never suggested that any of the 12 [empaneled] jurors was not impartial." *Id.* at 85-86. While the defendant needed "to exercise a peremptory challenge to cure the trial court's error," that did "not mean the Sixth Amendment was violated" given that no biased juror was seated. *Id.* at 88. Nor were the defendant's due process rights violated since he received the full complement of peremptory strikes. *Id.* at 89.

In arriving at these holdings, the *Ross* Court indicated that the result would have been different if the challenged juror had actually "sat on the jury." 487 U.S. at 85. In that event, "the sentence would have to be overturned" assuming the defendant "properly preserved his right to challenge," i.e., by objecting to the juror for cause. Cf. *ibid.* Shortly after *Ross*, this Court reiterated its "considered view" that "the trial court's failure to remove the juror for cause was constitutional error" which, "[i]f even one such juror [were] empaneled," would "disentitle[] [the State] to execute the sentence." *Morgan* v. *Illinois*, 504 U.S. 719, 728-29 (1992).

2. In *Martinez-Salazar*, this Court considered a question similar to the one presented in *Ross*, but in the context of a federal trial subject to Federal Rule of Criminal Procedure 24. As in *Ross*, the trial court erroneously refused to strike a juror for cause, the defendant expended a peremptory strike on the juror, and "the impartiality of the jury eventually seated was not challenged." *Martinez-Salazar*, 528 U.S at 309. After reiterating that "peremptory challenges are not of federal constitutional dimension," the Court held that Rule 24 is not violated if the defendant "use[d] a peremptory challenge curatively" to strike a juror who should have been removed for cause. *Id.* at 311, 315.

In arriving at this result, however, this Court again indicated—without holding—that if "the District Court's ruling result[ed] in the seating of any juror who should have been dismissed for cause," that "circumstance would require reversal." *Id.* at 316 (citing *Ross*, 487 U.S. at 85). Justice Scalia concurred, believing it unnecessary to "pronounce[] upon the question whether, had [the defendant] *not* expended his peremptory challenge, he would have been able to complain about the seating of the biased juror." *Id.* at 318 (Scalia, J., concurring).

3. This Court has yet to squarely take up the issue. In *Skilling*, the Court addressed a criminal defendant's "allegations of juror partiality" in resolving his venue challenge. 561 U.S. at 396. In a parenthetical quoting *Martinez-Salazar*, the Court reiterated that the "seating of any juror who should have been dismissed for cause … require[s] reversal." *Id.* at 395-96 (alterations in original). The Court ultimately held, however, that the defendant "failed to establish that a presumption of prejudice arose or that actual bias

infected the jury that tried him." *Id.* at 398. And although the decision was fractured, all active members of the Court appeared to agree that the seating of a biased juror would require reversal. See *id.* at 395-96 (Ginsburg, J., joined by Roberts, C.J., and Scalia, Kennedy, and Thomas, JJ.); *id.* at 425 (Alito, J., concurring) ("The Sixth Amendment guarantees criminal defendants a trial before 'an impartial jury.' In my view, this requirement is satisfied so long as no biased juror is actually seated at trial."); *id.* at 442 n.8 (Sotomayor, J. joined by Stevens and Breyer, JJ., dissenting in part) ("[A] trial court violates a defendant's right to an impartial jury if it erroneously denies a for-cause challenge to a biased venire member who ultimate sits on the jury.").

4. More generally, this Court's statements have suggested, but never squarely held, that a trial court commits structural error if it violates a defendant's Sixth Amendment right to an impartial jury. For instance, this Court has held that trial before a biased *judge* warrants automatic reversal, regardless of whether that bias would have changed the result: "No matter what the evidence was against [the defendant], he had the right to have an impartial judge." *Tumey* v. *Ohio*, 273 U.S. 510, 535 (1927). And this Court has often pointed to partiality of the tribunal as an example of structural error warranting automatic reversal. See *Gray* v. *Mississippi*, 481 U.S. 648, 668 (1987) (plurality opinion) (recognizing that the deprivation of "[t]he right to an impartial adjudicator, be it judge or jury," is among the errors that "can never be treated as harmless error"); *Chapman* v. *California*, 386 U.S. 18, 23 & n.8 (1967) (citing *Tumey* right to impartial tribunal as a "constitutional right[] so basic to a fair trial that their infraction can never be treated as

harmless error"); *Vasquez* v. *Hillery*, 474 U.S. 254, 263 (1986) (biased judge and prejudiced jury counted as "fundamental flaws, which never have been thought harmless") (plurality opinion); *Neder* v. *United States*, 527 U.S. 1, 8-9 (1999) ("[T]rial before a biased judge *** *necessarily* render[s] a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence."); *Irvin* v. *Dowd*, 366 U.S. 717, 722 (1961) ("In essence, the right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, 'indifferent' jurors. The failure to accord an accused a fair hearing violates even the minimal standards of due process."); cf. *Holland* v. *Illinois*, 493 U.S. 474, 480 (1990) ("The Sixth Amendment requirement of a fair cross section on the venire is a means of assuring, not a *representative* jury (which the Constitution does not demand), but an *impartial* one (which it does)."); *Parker* v. *Gladden*, 385 U.S. 363, 366 (1966) (defendant "entitled to be tried by 12, not 9 or even 10, impartial and unprejudiced jurors").

As a matter of principle, the presence of a biased juror should be structural error, as this Court's "[h]armless-error analysis *** presupposes *** an impartial judge and jury." *Rose* v. *Clark*, 478 U.S. 570, 578 (1986). Yet this Court has yet to hold as much. See Henderson, *supra* 85 Mo. L. Rev. at 90.

II. The Lower Courts Are Divided On Whether A Trial Court Commits Structural Error Under The Sixth Amendment By Erroneously Denying A For-Cause Challenge If The Biased Juror Is Seated.

In the absence of clear guidance from this Court, the lower courts have diverged on whether, as *Mar-*

tinez-Salazar suggests, the denial of a for-cause challenge "require[s] reversal" when the "ruling result[s] in the seating" of a biased juror. 528 U.S. at 316.

A. The State Supreme Courts Have Taken Irreconcilable Positions On The Question Presented.

1. Montana has joined a widening split in holding that the erroneous denial of a for-cause challenge is not structural error, even if it leads to a biased juror being seated. This mistaken result flows from earlier decisions *protecting* criminal defendants by holding that under state law, and in contrast to the Sixth Amendment, the erroneous deprivation of a peremptory challenge can require automatic reversal. Both Texas and now Montana have used such precedents to disregard structural errors under the Sixth Amendment. Other states have similar protective precedents that could, like Texas's and Montana's, wind up violating criminal defendants' Sixth Amendment rights.

a. The Montana Supreme Court has held that when a defendant uses a peremptory to cure an erroneous denial of a for-cause challenge, "the error is structural and requires an automatic reversal." *Good*, 43 P.3d at 960. Montana thus provides more protection to peremptory strikes than is required under the Sixth Amendment. E.g., *Ross*, 487 U.S. at 88. But the opinion below extends *Good* and makes its peremptory-protective rule the exclusive way to prove structural error regardless of whether an impartial juror actually sat. App. 41a-43a. Now, in Montana, even if a court abuses its discretion, erroneously denies a for-

cause challenge, and seats a biased juror, "that by itself is not enough to require a new trial." App. 40a. Instead, Montana courts must "determin[e] the effect" of seating a biased juror. *Ibid.* That analysis is clearly wrong. By treating the loss of a peremptory challenge as structural, but the seating of a biased juror as non-structural, Montana has established a system that gives both more and less than the Sixth Amendment requires. Montana is welcome to give more, but the Constitution forbids it from giving less.

b. Texas has taken a similar approach. Texas has long protected peremptory challenges by assuming harm from the use of a peremptory challenge to cure a trial court's erroneous denial of a challenge for cause, as long as the defendant also exhausts his peremptories, requests additional peremptory challenges, and notes the jurors he would have removed with those challenges. *Johnson* v. *State*, 43 S.W.3d 1, 5-6 (Tex. Crim. App. 2001) (en banc). But, as in Montana, this peremptory-protective rule has been applied to treat the seating of a biased juror over a valid for-cause challenge as non-structural. For example, in *Love* v. *State*, the Texas Court of Criminal Appeals applied that test to the question of whether harm occurred from a racially biased juror actually sitting on the jury. 2021 WL 1396409, at *24 (Tex. Crim. App. Apr. 14, 2021). The court held that it did not need to even review whether multiple jurors were actually biased because, under its test, Love "suffered no harm from the trial court's rulings even if they were erroneous." *Id.* at *9, *24.

c. In Montana and Texas, it has proven surprisingly easy to pirouette from protecting peremptory challenges to trampling on Sixth Amendment rights. Many other courts have similar peremptory-protective precedents that could be used to justify similar deprivations.

For example, Florida, Iowa, and Vermont presume prejudice and find reversable error where a defendant uses a peremptory to cure the erroneous denial of a for-cause challenge. See *Busby* v. *State*, 894 So. 2d 88, 96-97, 104 (Fla. 2004), as revised on denial of reh'g (Feb. 3, 2005); *State* v. *Jonas*, 904 N.W.2d 566, 583 (Iowa 2017); *State* v. *Santelli*, 621 A.2d 222, 224 (Vt. 1992). Oklahoma is similar but requires the defendant to indicate on the record "which remaining jurors the defendant would have excused if he had not used that peremptory challenge to cure the trial court's alleged erroneous denial of the for cause challenge." *Nolen* v. *State*, 485 P.3d 829, 852-53 (Okla. 2021). And the list goes on. See *State* v. *Grp.*, 781 N.E.2d 980, 991 (Ohio 2002); *Green* v. *Maynard*, 564 S.E.2d 83, 86 n.6 (S.C. 2002); *Ward* v. *Commonwealth*, 587 S.W.3d 312, 327-30 (Ky. 2019); *State* v. *Cox*, 490 P.3d 14, 19 (Idaho 2021); *State* v. *Komisarjevsky*, 258 A.3d 1166, 1217 & n.56 (Conn. 2021), cert. denied, 142 S. Ct. 617 (2021).

While designed to safeguard a criminal defendant's peremptory strikes, these tests—applied to Sixth Amendment errors—undercut the impartial jury right. In Montana, it took a single decision to mutate a peremptory-protective rule into a Sixth

Amendment error. The already-troubling split has the potential to cascade rapidly if left unaddressed.

2. If Deveraux had been tried in neighboring Colorado, Wisconsin, or many other states, his Sixth Amendment challenge on these grounds would have required automatic reversal.

a. In *People* v. *Abu-Nantambu-El*, a Colorado trial court denied a challenge for cause, the defendant used his peremptory challenges on other jurors, and the juror sat on the jury. 454 P.3d 1044, 1046, 1052 (Colo. 2019). On direct appeal, the Colorado Supreme Court held that the trial court erroneously denied the defendant's for-cause challenge, and that the challenged juror should not have been seated. *Id.* at 1051-52.

Addressing the federal constitutional question, the Colorado Supreme Court noted that "[c]ertain constitutional rights are so basic to a fair trial that their violation can never be harmless." *Id.* at 1050 (citing *Gray*, 481 U.S. at 668). Such rights include "a defendant's Sixth Amendment right to 'an impartial adjudicator, be it judge or jury.'" *Id.* (quoting *Gray*, 481 U.S. at 668). Applying *Martinez-Salazar* and *Ross*, the Colorado Supreme Court recognized that "if a trial court error results in the seating of a juror who is actually biased against the defendant, the defendant's right to an impartial jury is violated, the error is structural, and reversal is required." *Id.* at 1050 (citing *Martinez-Salazar*, 528 U.S. at 316; and *Ross,* 487 U.S. at 85). That the defendant exhausted his peremptories on other jurors did not change the result: where the biased juror "served on the defendant's jury,

the error is structural and [the] convictions must be reversed." *Id.* at 1052.

b. The Wisconsin Supreme Court has similarly held that structural error occurs when a juror sits after an erroneous decision not to remove her for cause. *State* v. *Gesch*, 482 N.W.2d 99, 101, 104 (Wis. 1992). In *Gesch*, the trial court refused to strike a juror for cause, the defendant "subsequently exhausted his peremptory challenges on other jurors," and the challenged juror sat on the jury. *Id.* at 101. After concluding that "bias must be implied and the juror excused," the court held that the trial court's failure to strike the juror for cause was "a violation of the defendant's rights under the Sixth Amendment of the United States Constitution." *Id.* at 103-104. As in *Abu-Nantambu-El*, all that mattered for the Sixth Amendment analysis was whether a challenged juror who should have been stricken for cause ultimately sat on the jury.

c. Nor are Colorado and Wisconsin alone in finding structural error requiring reversal when a trial court erroneously denies a for-cause challenge and the juror sits on the petit jury. Minnesota, Massachusetts, Maine, Utah, and the District of Columbia, among others, all hold that a biased juror serving on the jury—alone—is structural error requiring reversal. See *Ries* v. *State*, 920 N.W.2d 620, 635-36 (Minn. 2018); *Johnson* v. *United States*, 701 A.2d 1085, 1092 (D.C. Ct. App. 1997); *State* v. *Carey,* 214 A.3d 488, 493 (Maine 2019); see also *Commonwealth* v. *Hampton*, 928 N.E.2d 917, 925 (Mass. 2010); *State* v. *Carrera*, 517 P.3d 440, 462 (Utah Ct. App. 2022).

3. These approaches to biased juror challenges are irreconcilable. In reviewing a trial court's refusal to

strike a biased juror for cause, Colorado, Wisconsin, and other states look to whether a biased juror actually sat on the jury. The empaneling of a biased juror is itself enough to require "automatic reversal" under the Sixth Amendment. E.g., *Abu-Nantambu-El*, 454 P.3d at 1052; *Gesch*, 482 N.W.2d at 103-04. In Montana, however, that circumstance is *not* enough. The defendant must show not only that the trial court erred in "denying a challenge for cause to a prospective juror," but also that the defendant expended "one of his or her peremptory challenges to remove the disputed juror" and "exhaust[ed] all of his or her peremptory challenges." App. 14a.

The upshot is that, contrary to what the Colorado Supreme Court held in *Abu-Nantambu-El* and the Wisconsin Supreme Court held in *Gesch*, the seating of a biased juror, over the defendant's objection, is not enough to assert a Sixth Amendment violation in Montana. The same is true in Texas and could be true in other states that similarly require an additional showing (such as the loss of a peremptory challenge). See *Love*, 2021 WL 1396409, at *9 ("To prevail on a claim that the trial court erred in denying a challenge for cause, the defendant must also show harm.").

The split among the state supreme courts is direct. For instance, there is no principled distinction between the facts of Deveraux's case and those addressed in *Abu-Nantambu-El* and *Gesch*. In all three cases, a judge erred in denying a for-cause challenge. In all three cases, a defendant exhausted peremptory challenges on other jurors. And in all three cases, the challenged juror actually sat on the jury. But while the supreme courts in Colorado and Wisconsin re-

versed on structural error grounds, the Montana Supreme Court upheld the conviction. In doing so, Montana deepened the split over whether trial court's erroneous denial of a for-cause challenge amounts to structural error if the biased juror is seated.

B. There Is Confusion In The Lower Federal Courts Over Whether Seating A Biased Juror Constitutes Structural Error.

There is also confusion among federal jurists. The Fifth Circuit provides a ready example. Noting that this Court "has never held that juror bias is structural error requiring automatic reversal," Judge Owen expressed skepticism that actual bias on the jury would require reversal on habeas review. *Austin* v. *Davis*, 876 F.3d 757, 803-05 (5th Cir. 2017) (Owen, J., concurring); see *id.* at 804 ("The Supreme Court's listings of 'structural errors' that require automatic reversal do not include jury bias, either when it is raised in a direct appeal or in habeas proceedings.") (citing *Weaver* v. *Massachusetts*, 137 S. Ct. 1899, 1907-09, 1911 (2017)).

A panel of the Fifth Circuit recently reiterated Judge Owen's uncertainty. E.g., *Canfield* v. *Lumpkin*, 998 F.3d 242, 249 & n.25 (5th Cir. 2021), cert. denied, 142 S. Ct. 1781 (2022). The Fifth Circuit had previously held that *Strickland* prejudice is "perforce establish[ed]" when "deficient performance of counsel denied [defendant] an impartial jury, leaving him with [a jury] that could not constitutionally convict." *Virgil* v. *Dretke*, 446 F.3d 598, 613-14 (5th Cir. 2006); *id.* at 607 & nn. 34, 35 (canvassing this Court's decisions and concluding that seating a biased juror "def[ies] harmless error review"). Despite this, the panel in *Canfield* felt it could only "assum[e], for the

sake of argument, that a biased juror does pose a structural error." 998 F.3d at 249 & n.25.

The confusion continues. More recently, the Fifth Circuit recognized that "[i]f a juror should have been removed for cause, then seating that juror requires reversal." *Thomas* v. *Lumpkin*, 995 F.3d 432, 444 (5th Cir. 2021), cert. denied, 2022 WL 6573075 (Oct. 11, 2022) (citing *Martinez-Salazar*, 528 U.S. at 316). But the court went on to hold that, regardless, the state court was not "objectively unreasonable" in denying habeas relief even though empaneled jurors expressed actual racial animosity. *Id.* at 445. This inconsistency provoked a dissent by Judge Higginson, who would have held that the state habeas court's failure to give resolution to defendant's "structural error claim that jurors with actual, disqualifying bias were seated" required automatic reversal. *Id.* at 460-61 (Higginson, J., dissenting in part).

In contrast, many other circuits require automatic reversal, including on habeas review, when a biased juror ultimately sits on the jury. See *United States* v. *Nelson*, 277 F.3d 164, 204 (2d Cir. 2002) (on direct appeal finding seating of biased juror structural error warranting reversal); *United States* v. *Mitchell*, 690 F.3d 137, 147-148 (3d Cir. 2012) (reversing for further findings regarding relationship between juror and prosecutor because "the denial of the defendant's right to an impartial adjudicator, 'be it judge or jury,' is a structural defect in the trial") (quoting *Gomez* v. *United States*, 490 U.S. 858, 876 (1989)); cf. *Hughes* v. *United States*, 258 F.3d 453, 463 (6th Cir. 2001) (reviewing an ineffective assistance of counsel claim and concluding: "The seating of a biased juror who should have been dismissed for cause requires reversal of the conviction") (citing *Martinez-Salazar*, 528 U.S. at 316);

Johnson v. *Armontrout*, 961 F.2d 748, 756 (8th Cir. 1992) (affirming grant of habeas relief for ineffective assistance of counsel because "[t]he presence of a biased jury is no less a fundamental structural defect than the presence of a biased judge").

Indeed, the Second Circuit has long adhered to its "powerful dicta" that violation of the impartial jury right is both structural and not waivable:

> Where the trier of fact in a criminal trial is a biased jury that resulted from a district court's erroneous failure to grant a for-cause challenge to an actually biased juror whose bias was revealed at voir dire, we question whether a defendant can subsequently waive his claim that he has been deprived of the right to be tried before an impartial fact finder. At the root of our concern is the fundamental, indeed foundational, role impartiality plays in our system of courts.

Nelson, 277 F.3d at 206.

* * *

This Court should intervene to clarify these issues and make express what it suggested in *Ross* and *Martinez-Salazar*: that if a trial court errs in denying a for-cause challenge and the challenged juror ultimately serves on the jury, the defendant's Sixth Amendment rights have been violated, constituting structural error and "requir[ing] reversal." *Martinez-Salazar*, 528 U.S. at 316. While the Colorado Supreme Court adopted that principle in *Abu-Nantambu-El*, the Montana Supreme Court refused to apply the principle of *Martinez-Salazar*—which

Deveraux specifically cited in his briefing. Appellant's Opening Br. 34. The Texas Court of Criminal Appeals failed to heed that decision as well. See Opening Br., *Love* v. *Texas,* 2019 WL 6497349, at *101 (Tex. Crim. App. 2019).

III. The Court Should Use This Case To Resolve The Confusion Over The Sixth Amendment Right To An Impartial Jury And Make Clear That Seating A Biased Juror Is Structural Error Requiring Reversal.

This case raises precisely the "circumstance[s]" that the Court referenced in *Martinez-Salazar*, but which have not been addressed by its prior decisions: whether a defendant may "stand on his objection to the erroneous denial of the challenge for cause" and mount a Sixth Amendment challenge to a biased juror on direct appeal. See 528 U.S. at 316.

1. The trial court's error here "result[ed] in the seating of [a] juror who should have been dismissed for cause." Cf. *Martinez-Salazar*, 528 U.S. at 316. Deveraux moved to strike R.G. for cause, and the trial court abused its discretion in refusing to remove him. R.G. had specifically testified that his girlfriend had experienced marital rape—among the charges against Deveraux—and that he therefore "may have a problem in this area, out of sympathy" for the victim. App. 57a. R.G. showed visible emotion during voir dire. App. 56a-57a. And when defense counsel asked R.G. if he would want him on the jury "[i]f you were my client," R.G. responded: "I don't believe so" and "I should not be chosen." App. 57a. In *Good*, which set out the state-law framework that barred Deveraux's Sixth Amendment challenge, the Montana Supreme Court held that it was error not to strike jurors who

"expressed reservations about their ability to give the benefit of any doubt to the Defendant in light of their predisposition to favor the testimony of a *** complaining witness." 43 P.3d at 958. Nor was the prosecution's attempted rehabilitation sufficient in this case, for the Montana Supreme Court has held it improper "to rehabilitate the juror through the use of leading or loaded questions, such as whether the juror will follow the law." *Johnson*, 437 P.3d at 151. That is no doubt why the Court went directly to Deveraux's Sixth Amendment challenge.

Deveraux's challenge tracked the circumstances hypothesized in *Martinez-Salazar*. The trial court denied Deveraux's for-cause challenge to R.G. "Deveraux's counsel exercised all six of his peremptory challenges, but did not use one to remove R.G., and R.G. ultimately sat on the jury." App. 6a. Deveraux raised his Sixth Amendment challenge to the trial court's for-cause denial in his motion for new trial. App. 42a ("Deveraux cites *Ross* *** to suggest that the core inquiry is not whether the juror should have been excused for cause or by using a peremptory, but whether a biased juror made it onto the jury."); see also Appellant's Reply Br. Mot. New Trial 10. And he raised it on direct appeal to the Montana Supreme Court (Appellant's Opening Br. 34-36), which passed on the question (App. 13a-15a). Had Deveraux raised this challenge in Colorado, Wisconsin, or states taking the same approach, the court would have ruled that "the defendant's right to an impartial jury is violated, the error is structural, and reversal is required." Cf. *Abu-Nantambu-El*, 454 P.3d at 1050 (citing *Martinez-Salazar*, 528 U.S. at 316; and *Ross*, 487 U.S. at 85). But Montana denied Deveraux the automatic reversal required by the Sixth Amendment.

2. Montana's "structural error" test distorts and confuses the Sixth Amendment's demands. Montana looks beyond the fundamental Sixth Amendment question of whether a biased juror was seated due to the trial court's error. Instead, Montana focuses on whether a defendant was denied a *peremptory* challenge, asking whether the defendant expended a peremptory strike "to remove the disputed juror" and then "exhaust[ed] all of his or her peremptory challenges." App. 14a. The court treats an erroneous for-cause denial as "structural error" only if it "effectively reduc[ed] that party's number of peremptory challenges." *Good*, 43 P.3d at 961.

Montana thus flips this Court's Sixth Amendment jurisprudence on its head. *Ross* "reject[ed] the notion that the loss of a peremptory challenge constitutes a violation of the constitutional right to an impartial jury," while cautioning that the Sixth Amendment would be violated, and the verdict "would have to be overturned," if the trial court denied a for-cause challenge and the disputed juror actually "sat on the jury." 487 U.S. at 85, 88. Yet, Montana's test would find a Sixth Amendment violation when a defendant expends one of his exhausted peremptory strikes to remove the biased juror (contra *Ross*, 487 U.S. at 88) while finding no Sixth Amendment violation when a biased juror sits over a defendant's objection (contra *Morgan,* 504 U.S. at 728; *Martinez-Salazar*, 528 U.S. at 316).

The Montana test also focuses on the wrong juror. As this Court stated in *Ross*, impartial jury claims "must focus not on the [removed juror], but on the jurors who ultimately sat." *Ross*, 487 U.S. at 86. Montana requires the opposite, conditioning Deveraux's Sixth Amendment rights on the *removal* of a juror.

Further compounding this error, Montana ruled that Deveraux lacked a Sixth Amendment claim on appeal *because* he exhausted his peremptories on other potential jurors, "let[] [R.G.] sit on the petit jury and, upon conviction, pursu[ed] a Sixth Amendment challenge on appeal." *Martinez-Salazar*, 528 U.S. at 315. But that was the very "choice" that this Court stated defendants should have: appeal the erroneous decision as Sixth Amendment error or use a peremptory on the juror. *Ibid.*

3. This case provides an ideal opportunity for the Court to clarify the Sixth Amendment's protections in jury selection. It should hold that the Sixth Amendment protects the "choice" that Deveraux made here—"to stand on his objection to the erroneous denial of the challenge for cause or to use a peremptory challenge to effect an instantaneous cure of the error." *Id.* at 316.

The need for review is only underscored by this Court's narrow decision last term denying review in *Love* v. *Texas*, 142 S. Ct. 1406 (2022) (Sotomayor, J., with Breyer and Kagan, JJ., dissenting). There, the trial court in a capital case denied the defendant's for-cause challenge on racial bias grounds, and the juror was seated. *Id.* at 1406. On direct appeal, the Texas Court of Criminal Appeals did not even mention the Sixth Amendment. Instead, it reasoned that "even if we assume that the trial court erred in denying [the defendant's for-cause] challenges," the error was harmless under Texas law. *Love*, 2021 WL 1396409, at *24. Under Texas's rule, the error was cured by extra peremptory challenges given to the defendant—even though the defendant had already exhausted them when he made the for-cause challenge. *Love*, 142 S. Ct. at 1407.

In dissenting from the denial of summary vacatur, Justice Sotomayor noted that "[w]hatever the nature of the bias, if a trial court seats a juror who harbors a disqualifying prejudice, the resulting judgment must be reversed." *Id.* at 1408 (citing *Martinez-Salazar*, 528 U.S. at 316). Justice Sotomayor reasoned that Texas's harmless-error "rule has no bearing on [a criminal defendant's] federal constitutional claim that a *** biased juror actually sat on his jury." *Ibid.* "As to that type of claim," Justice Sotomayor explained, "a previously used peremptory strike does not eliminate the need to inquire into the juror's bias." *Ibid.*

The petition for certiorari in *Love* did not discuss the split among the state courts or the confusion among federal jurists. And since *Love*, the split has already worsened. If anything, the sequential rulings in *Love* and the decision below suggest the confusion on this important issue is cascading.

Moreover, Deveraux's case has none of the barriers to review present in *Love*. While the Court did not articulate why the petition was denied in *Love*, a central concern appears to have been that the Texas Court of Appeal had decided merely a state-law question and not a Sixth Amendment one. See Texas Br. in Opp. at 13, *Love* v. *Texas* (No. 21-5050) (arguing that the "ruling rests exclusively on state-law grounds"). While that should not have led to the *Love* petition being denied, it is true that the Texas Court of Criminal Appeals did not mention the Sixth Amendment in its decision, and instead analyzed the denial of Love's for-cause challenge solely under Texas' harmless error rules. See 2021 WL 1396409, at *24.

By contrast, the Montana Supreme Court squarely addressed Deveraux's claim that he had "a fundamental right under both state and federal constitutions to be tried by an impartial jury" and held that "Deveraux has not satisfied the structural error standard required by *Good* that would entitle him to reversal." App. 14a, 16a. In other words, the court rightly (and explicitly) analyzed Deveraux's claim as a Sixth Amendment one but wrongly (and explicitly) held the error was not structural.

4. Additionally, this Court's recent grant in *Weaver* makes clear that certiorari is warranted where there is a split among lower courts over whether a Sixth Amendment error is structural. See *Weaver*, 137 S. Ct. at 1907; cf. *Betterman* v. *Montana*, 578 U.S. 437, 440 (2016); *Turner* v. *Rogers*, 564 U.S. 431, 438 (2011). Given the importance of the impartial jury trial right at issue here, it is even more critical that the Court weigh in. That is especially so here because the decision below is in tension with this Court's statements on impartial jurors in *Martinez-Salazar* and *Ross*, and would be clearly wrong if those statements had been *holdings*. See *Bunkley* v. *Florida*, 538 U.S. 835, 836 (2003) (granting certiorari where state supreme court "contradicted the principles of this Court's decision[s]").

IV. The Impartial Jury Right Is Fundamental And Demands Automatic Reversal If A Biased Juror Sits.

The history and original meaning of the impartial jury guarantee confirms it is a fundamental right, and that its violation demands automatic reversal. By imposing a further inquiry—beyond whether the trial

court erred in seating R.G.—the Montana Supreme Court veered from these principles.

1. The fundamental importance of jury impartiality is evident from the earliest days of our Republic. By the founding, the common law treated juror impartiality as an essential to a fair trial, as was recognized by Lord Coke, see *Irvin*, 366 U.S. at 722, and William Blackstone, 3 Blackstone, Commentaries on the Laws of England at 380 (1768). Chief Justice Marshall viewed "an impartial jury as required by the common law, and as secured by the constitution." *Burr*, 25 F. Cas. 49. The impartial jury is "the most priceless" "safeguard for the preservation" of "individual liberty," *Irvin*, 366 U.S. at 721, something "fundamental to the American scheme of justice," *Ramos* v. *Louisiana*, 140 S. Ct. 1390, 1397 (2020) (quotation and citation omitted).

Early state court decisions required reversal for violation of the impartial jury right. For instance, the Mississippi Supreme Court reversed when a juror "had formed and expressed an opinion against the prisoner" prior to trial because "the constitutional right which has been guaranteed to every man to a trial *** by an impartial jury of this country[] demanded *** a new trial." *Cody* v. *State*, 4 Miss. 27, 31 (Miss. 1838). Likewise, the Georgia Supreme Court reversed when a juror admitted a tendency "to believe that which would *convict*, and to disregard that which would *acquit* the prisoner." *Bishop* v. *State*, 9 Ga. 121, 129 (Ga. 1850). Granting a new trial, the court explained:

> It is the pride of the Constitution of this country, that all causes should be decided by Jurors, from whose breasts are

> excluded all bias and prejudice. To break down any of these safeguards, so wisely erected, and to suffer Jurors to decide upon the life and liberty of the citizen, whose minds are poisoned by passion or prejudice, would be to stab the upright administration of justice in its most vital parts. We cannot hesitate, therefore, to pronounce Madison Malsby an incompetent Juror, and that the Circuit Court ought to have awarded a new trial to the defendant on that account.

Id. at 129-30.

Other early cases are in accord. "At the foundation of American jurisprudence is the right to be tried by an impartial, unprejudiced jury; it is a right paramount to all others, and is not to be sacrificed to the fear or apprehension of wounding the feelings of others." *People* v. *Christie*, 2 Abb. Pr. 256, 258-59 (N.Y. Sup. Ct. 1st Dist. 1855) (reversing for new trial); *Jaques* v. *Commonwealth*, 51 Va. 690, 695 (Va. 1853) ("a new trial [must be] awarded" where the "nephew by marriage to the party whose property is charged to have been destroyed by the incendiary" was erroneously seated as a juror).

Judges came to the same result in civil cases. "Nothing could be clearer, than that there ought to be a new trial in this case" where a party fraternized with jurors. *Perkins* v. *Knight*, 2 N.H. 474, 475 (N.H. Sup. Ct. of Judicature 1822). Reversal was required to avoid even the appearance of bias: "It is of the highest importance, that they [the jurors] should be preserved not only from all improper bias in causes, but even from the suspicion of improper bias." *Ibid.*; see

also *Studley* v. *Hall*, 22 Me. 198, 201-03 (Sup. Judicial Ct. of Me., County of Waldo 1842).

2. Although the Court has not had occasion to hold it directly, the erroneous seating of an impartial juror, over objection, fits the class of structural errors resulting in "fundamental unfairness" entitling appellants to "'automatic reversal' regardless of the error's actual 'effect on the outcome.'" *Weaver,* 137 S. Ct. at 1910 (citing *Neder* v. *United States*, 527 U.S. 1, 7 (1999)); see also *id.* at 1905. The erroneous inclusion of a biased juror plainly "affect[s] the framework within which the trial proceeds," *Arizona* v. *Fulminante*, 499 U.S. 279, 295, 310 (1991), and "render[s] a criminal trial fundamentally unfair," cf. *Neder* 527 U.S. at 9.

The error below should be considered structural error, as it implicates a constitutional error that "necessarily render[s] a trial fundamentally unfair." *Rose*, 478 U.S. at 577. Indeed, as this Court has recognized, a harmless-error analysis is only possible because our system "presupposes a trial, at which the defendant, represented by counsel, may present evidence and argument before an impartial judge and jury." *Id. at* 578. "Without these basic protections, a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence." *Id.* at 577-78.

Absent the structural prerequisite of an impartial jury, reversal is required. As this Court has stated, "[w]hen constitutional error calls into question the objectivity of those charged with bringing a defendant to judgment, a reviewing court can neither indulge a presumption of regularity nor evaluate the resulting harm." *Vasquez* v. *Hillery*, 474 U.S. 254, 263 (1986). Such "fundamental flaws *** never have been thought harmless." *Ibid.*

CONCLUSION

For the foregoing reasons, certiorari should be granted.

Respectfully submitted,

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